(3)

No. 87-746

SUPREME COURT
of the
UNITED STATES
October Term, 1987

MICHAEL H. and VICTORIA D.,
a minor by and through her
guardian ad litem, LESLIE SHEAR,

Appellants,

vs.

GERALD D.,

Appellee.

On Appeal from the Court of Appeal
State of California
Second Appellate District

MOTION TO DISMISS OR AFFIRM

GERALD DEARING
278 11th Street
Apt. A
New York, N.Y. 10014
(212) 691-9848
Appellee, Pro Se

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INTRODUCTION

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the California Court of Appeal, Second Appellate District on the ground that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

STATE STATUTE INVOLVED

Subdivision (a) of the California Evidence Code §621, like the law in many states, creates a presumption that a man is the father of children conceived by his wife during their marriage. What sets the law apart and brings it to this Court are its provisions that restrict the interested parties from offering evidence to rebut the presumption; under **subdivisions (b), (c), and (d),** the presumption may be rebutted by blood test evidence but only by the husband or by the mother.[1] In this case, the statute was invoked by the husband to terminate a proceeding in which it was alleged that a child of the marriage was the product of the mother's extra-

(1) The statute also limits the right of the mother and husband to dispute the presumption: the mother's right is conditioned upon the filing with the court of an affidavit of the child's biological father acknowledging paternity, and neither mother nor husband may offer rebuttal evidence after the child attains the age of two years.

marital affair. Appellants, the putative father and the independent guardian ad litem appointed by the Trial Court to represent the interests of the child, contend here, as they did unsuccessfully below, that application of the statute denied them their rights under the United States Constitution because (1) the statute serves no legitimate state interest so significant that it outweighs the right of appellants to prove the facts of biological paternity, and (2) the statute draws an impermissible gender-based distinction between married women and the men with whom they have adulterous affairs, in that the mother has the right (limited though it may be) to offer evidence rebutting the presumption, while the presumption is conclusive as to the putative father (**Jurisdictional Statement**, pages 25-26).

ARGUMENT

1. Due Process

Section 621 does not purport to factually determine the biological paternity of a child, and it is not a rule designed for the orderly administration of judicial proceedings; rather, despite its placement in the **Evidence Code**, it is "a substantive rule of

law based upon a determination by the Legislature as a matter of overriding social policy", **Kusior v. Silver** (1960) 54 C2d 603, 619. Like the rule which excludes from criminal actions evidence illegally obtained by the police, **California Evidence Code §621** sacrifices relevant evidence to serve an interest deemed more significant than ascertaining the "truth" in a court of law. Among the state's interests promoted by application of the statute, as identified in California case law, include protection of the integrity of the matrimonial family and preservation of its privacy, **Kusior v. Silva**, supra, 54 C2d 603, 619, and protecting the child from the social stigma of illegitimacy, **In re Marriage of B.** (1981) 124 Cal.App.3d 524, 529-530.

As they must, Appellants recognize that application of the statute in the case at bar served those purposes; Appellee's marriage to the mother endures, and they currently reside as a family with Victoria D., who is six and a half, and their baby boy, now eleven months old. Rather, Appellants suggest that the time has come to abandon the nuclear family as a model, and to strip the institution of its favored treatment under the law (**Jurisdictional Statement**, page 15); for Appellants, the due process question in this appeal is whether the state's interest in protecting the matrimonial family is sufficiently significant to override Michael's and Victoria's professed rights to prove their biological connection in a court of law.

Both the Trial Court and Court of Appeal had little difficulty in answering that question in the affirmative. For both courts, the result in this case was compelled by the decision in the earlier case of **Vincent B. vs. Joan R.** (1981) 126 Cal.App.3d 619, where the California Court of Appeal affirmed a judgment dismissing the paternity action brought by the putative father. In that case, the putative father's interest in proving paternity was far more substantial than Michael's; whereas Michael claims to have developed a parent-child relationship with Victoria during periods when he cohabited with the mother (for three months before Victoria's first birthday and for eight months before her third birthday), application of the statute in **Vincent B.** terminated a life-long relationship between the putative father and his seven year old child. On the other hand, the state's interest in application of the statute in **Vincent B.** was far less significant than its interest in the case at bar; while the mother and husband in **Vincent B.** had been divorced, and there was no existing marital family to protect, the marriage of Carole and Gerald flourishes, and the family now includes another child.

This Court, too, may comfortably rely upon precedent in summarily disposing of Appellants' claims. In **Lehr v. Robertson** (1983) 463 US 248, this Court recognized the continuing importance of the matrimonial family and the legitimacy of the states' interest in preserving and protecting it.[2] Moreover, **Vincent B.** was appealed to this Court, and the appeal was dismissed for failure to raise a substantial federal question, **Vincent B. v. Joan R.** (1982) 459 US 807. This Court has, for the same reason, also dismissed appeals from the judgment of the California Supreme Court in two more recent cases rejecting equal protection and due process challenges to application of the conclusive presumption, **Estate of Cornelious** (1983) 35 C3d 461, app. dism. (1984) 466 US 967 (where the decedent's heirs invoked the statute to protect their inheritance from a woman claiming to be decedent's daughter but whose mother had been married to another man) and **In re Michelle W.** (1985) 39 C3d 354, app. dism. sub. nom. **Michelle W. v. Riley** (1986) 474 US 1043 (where the statute was invoked by the husband to defeat the claims of the putative father and child even though the mother had dissolved her marriage to the husband and married the putative father). An order of this Court dismissing an appeal constitutes a disposition of the case on its merits and carries the effect of **stare decisis, Hicks v. Miranda** (1975) 422 US 332, 344.

(2) "The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family," **Lehr v. Robertson**, 463 US, at 257.

2. Equal Protection

Appellants contend that the statute denies the putative father equal protection because it invidiously discriminates on the basis of sex against a man who has an affair with a married woman since the woman may, but the man may not, offer evidence in judicial proceedings to establish that the man, and not the woman's husband, fathered the woman's child. Appellants are simply wrong; the statute does not afford different treatment to the mother and the putative father. To assure that the child will not be left fatherless, the law allows the mother to offer rebutting evidence only if she first obtains the putative father's acknowledgement of paternity; thus, the mother may offer evidence to

rebut the presumption if, and only if, the putative father joins her efforts to challenge the husband's claim of paternity. The effect of the requirement that the putative father cooperate with the mother is that the mother's right to dispute the presumption is coextensive with the putative father's.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this case depends is so unsubstantial as not to need further argument, and Appellee respectfully moves this Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in this case by the California Court of Appeal.

Respectfully submitted,

GERALD DEARING
Appellee, Pro Se

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 9016 Mission Boulevarde, Riverside, California 92509.

On February 29, 1988, I served the within MOTION TO DISMISS OR AFFIRM on the interested parties in said action, by placing a true copy in each of five (5) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Clerk, Court of Appeal
2nd Appellate District
3580 Wilshire Blvd.
Los Angeles, CA 90010

Clerk of Superior Court
County of Los Angeles
111 North Hill Street
Los Angeles, Ca 90010

Valerie Vanaman
Newman, Aaronson, Krekorian
& Vanaman
14001 Ventura Blvd.
Sherman Oaks, CA 91423

Patricia Erickson
Paul Hoffman
ACLU
633 S. Shatto Place
Los Angeles, CA 90005

Michael Oddenino
199 S. Los Robles Avenue
Suite 711
Pasadena, CA 91101

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on February 29, 1988, at Riverside, California.

JACK GALLAGHER